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No. 94-956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
Petitioners,

v.

ALABAMA POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state legislature, consistent with antitrust law, allocate exclusive territories to suppliers of electricity by enacting legislation that incorporates boundaries previously drawn by private electric suppliers, if its legislation provides that no subsequent agreements between suppliers concerning territorial boundaries will be effective without legislative approval?

2. Where a state legislature acts to limit competition directly, rather than through a subordinate or coordinate agency, must its actions meet an "active supervision" test borrowed from different factual and legal contexts?

3. Where a state legislature acts to limit competition by allocating exclusive territories to suppliers of electricity and incorporates certain boundaries agreed upon by private corporations and by municipal corporations, must the state legislature actively supervise such agreements involving municipal corporations?

RULE 29.1 STATEMENT REGARDING PARENT COMPANIES AND SUBSIDIARIES

The respondents submitting this Response are as follows:

The Alabama Rural Electric Association of Cooperatives
Alabama Electric Cooperative, Inc.
Dixie Electric Cooperative
Covington Electric Cooperative, Inc.
Marshall-DeKalb Electric Cooperative
Southern Pine Electric Cooperative
Cherokee Electric Cooperative
Cullman Electric Cooperative
Pioneer Electric Cooperative, Inc.
Tombigbee Electric Cooperative, Inc.
Wiregrass Electric Cooperative, Inc.
Joe Wheeler Electric Membership Corporation
Clarke-Washington Electric Membership Corporation
Tallapoosa River Electric Cooperative
Pea River Electric Cooperative
Central Alabama Electric Cooperative
Sand Mountain Electric Cooperative
Franklin Electric Cooperative
North Alabama Electric Cooperative
Baldwin County Electric Membership Corporation
Coosa Valley Electric Cooperative, Inc.
South Alabama Electric Cooperative, Inc.
Arab Electric Cooperative, Inc.

None of these entities has a corporate parent or subsidiary within the meaning of Rule 29.1.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

1. *Factual Background:*

In Alabama, electric service at retail has been provided by four types of electric suppliers: The Tennessee Valley Authority, Alabama Power Company, electric cooperatives formed under Alabama state law,[1] and municipalities that own and operate electric facilities pursuant to legislative authorization.[2] This litigation concerns the decision of the Alabama Legislature to promulgate statutes governing who should provide electric service at retail to a particular customer where two or more suppliers are physically capable of doing so.

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[1] Ala. Code §§ 37-6-1 *et seq.* (1992).

[2] Ala. Code §§ 11-81-140, 11-81-160, 11-81-200 *et seq.* (1991).

In 1984, the Alabama Legislature enacted Act No. 84-206, pertaining to service territories for electric suppliers. 73a-96a. Act No. 84-206, now codified at Sections 37-14-1 through 37-14-17 of the Alabama Code, noted that the Alabama Legislature had investigated the economic, financial and environmental impact associated with duplicate electric distribution facilities, and affirmatively declared the Legislature's conclusion that "the benefit normally associated with competition between two or more entities for customers is outweighed by the tremendous cost burden which must be borne by such customers associated with the maintenance of two or more duplicate sets of facilities." Ala. Code § 37-14-1 (1992) (73a). The Legislature also found that the existence of duplicate facilities for furnishing electricity at retail "is not in the public interest" because of its adverse effect on safety, aesthetics, and the environment. *Id.* The Legislature therefore mandated that the policy of the state of Alabama would be "to ensure effective, economical and orderly supply of electric service . . . and to avoid unnecessary duplication of facilities by electric suppliers which would result in waste and in degradation of the environment." *Id.* Finally, the Alabama Legislature indicated that it was "necessary and in the public interest to establish, mandate and implement procedures for determining which electric supplier shall furnish electric service to customers at retail within various areas of the state." *Id.*

The substantive provisions of Act No. 84-206, the Alabama Legislature's statutory response to the environmental and other considerations noted above, may be summarized as follows:

1. It "freezes", for purposes of the Act, all municipal boundaries at their positions on April 26, 1984. Ala. Code §§ 37-14-2(8), 37-14-3(6) (1992) (75a, 78a);

2. It "freezes", for purposes of the Act, all distribution lines in existence on January 1, 1984. Ala. Code §§ 37-14-2(5), 37-14-3(6) (1992) (75a, 78a);

3. It provides that retail electric service shall be provided by the electric supplier whose distribution lines on January 1, 1984, were closest to the customer, with exceptions for (a) large-load customers and (b) electric suppliers themselves when acting as electrical customers at their premises. Ala. Code § 37-14-3(1) (1992) (76a-77a);

4. It provides for the incorporation of several pre-existing agreements between various adjoining electric suppliers into the overall territorial plan, as those agreements were found by the Alabama Legislature not to be inconsistent with the purposes and policies set forth in the Act. Ala. Code § 37-14-8 (1992) (86a-88a);

5. It provides that subsequent to April 26, 1984, suppliers can enter into mutual agreements regarding nonduplication of lines, but that no such subsequent agreement will be valid "unless and until it has been reviewed and approved by the legislature." Ala. Code § 37-14-8 (88a).

After the passage of Act No. 84-206, a judicial challenge to its overall validity met with initial success in the United States District Court for the Middle District of Alabama.[3] In response to this initial adjudication of invalidity, which did not involve antitrust contentions, the Alabama Legislature passed a substantially similar act, No. 85-645, which is now codified at Sections 37-14-30 through 37-14-40 of the Alabama Code. (97a-125a). This act incorporated four additional agreements between electric suppliers into the overall operation of the territorial plan. Ala. Code § 37-14-36 (11-14) (1992). (115a). This act, like Act No. 84-206, provided that no subsequent accord between suppliers would be valid absent legislative review and legislative action to amend its statutes. Ala. Code § 37-14-36 (1992). (116a).

Governmental territorial division of electrical service areas in Alabama, then, is a relatively recent phenomenon. However, it is in no sense unparalleled among the various states; some 34 other states, desiring to prevent wasteful duplication of facilities, have enacted procedures providing for permanent boundaries or service areas for electric suppliers.[4] With the enactment of Act No. 84-206 and of Act

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[3] This judgment was subsequently vacated on jurisdictional grounds. *Dixie Elec. Coop. v. Citizens of Ala.*, 789 F.2d 852 (11th Cir. 1986).

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[4] Ga. Code Ann. §§ 46-3-1 *et seq.* (Michie 1992); Idaho Code §§ 61-332 *et seq.* (1994); Ill. Comp. Stat. §§ 30/1 *et seq.* (1992 & Supp. 1993); Ind. Stat. Ann. §§ 8-1-2.3-1 *et seq.* (1991); Iowa Code §§ 476.22 *et seq.* (1993); Kan. Stat. Ann. §§ 66-1, 170 *et seq.* (1992); Ky. Rev. Stat. Ann. §§ 278-016 *et seq.* (1989 & Supp. 1994); La. Rev. Stat. Ann. § 45.123 (Supp. 1994); Minn. Stat. §§ 216B.37 *et seq.* (1992 &

No. 85-645, Alabama has now joined her sister states in their conclusion that a system of retail electric territorial allocation is in the public interest, and that this public interest outweighs the interest of any individual supplier.

2. *Proceedings Below:*

Plaintiffs, 30 municipal and public corporations supplying electricity at retail ("Cities"), filed suit in the United States District Court for the Middle District of Alabama against Alabama Power Company ("Alabama Power"), 23 rural electric cooperatives ("Cooperatives"), and the Alabama Rural Electric Association of Cooperatives ("AREA"). The Cities sought declaratory relief, injunctive relief, and damages from all defendants, alleging a conspiracy to suppress competition in the retail electric market in violation of antitrust laws. Specifically, the Cities alleged that Alabama Power and the Cooperatives had conspired with the Alabama Legislature to divide and designate retail electric territories.

Following a hearing, the district court granted Defendants' Motion to Dismiss, which had asserted Defendants' immunity from antitrust liability under the *Noerr-Pennington*[5] doctrine and the state action doctrine first enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). (61a-69a). The Cities appealed this dismissal order to the Court of Appeals for the Eleventh Circuit, which affirmed

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Supp. 1993); Mo. Rev. Stat. §§ 393.106, 394.315 (1993 Supp.); Mont. Code Ann. §§ 69-5-101 *et seq.* (1993); Neb. Rev. Stat. § 70-1001 *et seq.* (1990 & Supp. 1994); N.C. Gen. Stat. §§ 62-110.2 (1994), 160A-331 *et seq.* (1994 Supp.); N.D. Cent. Code §§ 49-03-01.1 *et seq.* (1978 & Supp. 1993); Ohio Rev. Code Ann. §§ 4933.81 *et seq.* (Baldwin 1991); Okla. Stat. §§ 158.21 *et seq.* (West 1991 & 1993); S.C. Code Ann. §§ 58-27-610 *et seq.* (Law. Co-op. 1977 & 1993 Supp.); S.D. Codified Laws Ann. §§ 49-34A-42 *et seq.* (1993); Tenn. Code Ann. §§ 65-34-101 *et seq.* (1993); Va. Code Ann. § 56-265.3 (Supp. 1994); Wis. Stat. § 196.495 (1993).

In addition, a number of state governments have reserved the right to determine territorial boundaries without expressly delineating territories by statute, including Alaska, Arizona, California, Colorado, Delaware, Florida, Mississippi, New Mexico, Oregon, Pennsylvania, Texas, Utah, Vermont, and Wyoming. Typically, these boundaries are set by an executive agency.

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[5] *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (immunizing efforts among competitors to restrain trade by petitioning government officials).

the district court's determination that Defendants' allegedly anticompetitive conduct in securing passage of Act No. 84-206 and of Act No. 85-645 was not actionable under the *Noerr-Pennington* doctrine. (49a-50a). This issue before the Court of Appeals is not raised by Petitioners in this Court.

However, with respect to the actions of the Defendants taken pursuant to the Acts (i.e., after their passage), the Court of Appeals affirmed in part and reversed and remanded in part. (50a-51a). In reaching its conclusion, the Court of Appeals analyzed whether the Acts met the two-pronged test set forth in this Court's opinion in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). (41a-42a). The Court of Appeals, applying *Midcal*, stated that "[a] state statute limiting competition will not run afoul of the Sherman Act provided that: (1) the challenged state statute was implemented pursuant to a clearly articulated state policy restraining competition; and (2) the policy was actively supervised by the state." (41a). The Court of Appeals found that the Acts clearly articulated a state policy to displace competition, but bifurcated its analysis of the supervision requirement of *Midcal*: it reviewed the general territorial boundary rules contained in the Acts separately from the boundaries set forth in the incorporated private agreements that departed in some respects from the general territorial rules. (41a-49a). The Eleventh Circuit concluded that the Alabama Legislature had reserved control in the general provisions of the Acts over all of the claimed anticompetitive decisions challenged by the Cities, and that the Acts set forth the precise procedures that suppliers must follow to service areas outside municipal limits. (45a-46a). However, the Court of Appeals held that because the incorporated agreements listed at Sections 37-14-8 and 37-14-36 of the Alabama Code were not then in the record, it could not determine whether they complied with *Midcal*'s supervision requirement. (48a). Thus, the Court of Appeals remanded only the question of whether the incorporated agreements were actively supervised to the district court. (49a, 51a).

On remand, the district court considered whether the private ter-

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[6] The district court did not reach the question whether, because municipal entities were parties to several of the agreements, such agreements would not be subject to active supervision. (21a).

ritorial agreements adopted by the Legislature into the overall plan of the Acts met *Midcal*'s active supervision requirement.[6] The district court concluded that the private agreements incorporated into the Acts left no room for discretionary anticompetitive behavior by the parties; construing the "subsequent agreement" provisions of the Acts, it specifically found that any modification of the incorporated agreements would require legislative approval under Alabama Code Section 37-14-36 and its counterpart in Act No. 84-206 (Section 37-14-8) (19a). The district court thus granted summary judgment in favor of the Defendants and again dismissed Petitioners' Complaint.

Petitioners again appealed to the Court of Appeals for the Eleventh Circuit, which affirmed the district court. (1a-7a). The Court of Appeals reviewed the incorporated agreements that the Cities contended allowed for territorial modifications without legislative approval, and juxtaposed the contract language that appeared to allow some limited discretion in customer allocation with the Legislature's mandate that no subsequent agreement shall be valid until reviewed by it. (4a-7a). The Court of Appeals held that the district court's interpretation of the Acts so as to require legislative approval of modifications to existing agreements was consistent with the statutes' plain language, and that the incorporated private agreements therefore qualified for state action immunity. (7a-8a). The Court of Appeals subsequently denied the Cities' Petition for Rehearing and their suggestion of rehearing en banc, and the Cities have now petitioned this Court for a Writ of Certiorari directed to the Court of Appeals for the Eleventh Circuit to review that court's judgment.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Does Not Conflict With This Court's Opinions

Petitioners have asserted throughout this litigation that the Alabama Legislature's adoption of two statutes dividing electric service territories at retail constitutes a violation of federal antitrust laws. However, the Petitioners have never fully addressed the import of the legislative nature of the current service divisions, but have instead insisted upon drawing attention to the private origin of incor-

porated agreements between electric suppliers that predate adoption of the Territorial Acts. Under the Petitioners' theory, the Court of Appeals for the Eleventh Circuit incorrectly decided this case because some of the territorial boundaries incorporated into the statute were originally drawn by private entities rather than by legislators. However, this fact does not create a conflict with this Court's decisions relating to legislative action of an anticompetitive nature, and review by this Court is thus not warranted.

The concept of exempting actions mandated by a state's government from the purview of antitrust laws was first cogently articulated by this Court in 1943 in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, this Court upheld a state's imposition of a government marketing and grading program upon its resident raisin growers, which resulted in reduced competition among those growers. The Court's language in this regard is instructive:

> [The state prorate program] derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . .
>
> . . .
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . [and t]here is no suggestion of a purpose to restrain state action in the Act's legislative history. . .
>
> . . .
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

Parker, 317 U.S. at 350, 351, 352. Thus, the *Parker* Court recognized that the elimination of competition, when directly effected by a state legislature, is permissible under federal antitrust laws.

In the decisions since *Parker*, the Court has refined state action analysis so as to ensure that antitrust immunity is afforded only when the conduct undertaken by market participants can fairly be said to have been authorized or approved by the state as sovereign. Thus, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court invalidated a state statute forbidding licensees in the wine trade from selling at a price below that set by the producers; the Court articulated two prerequisites that a restraint of trade must meet to qualify private market participants for immunity under the state action doctrine: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Midcal*, 445 U.S. at 105 (internal quotation marks omitted). Petitioners contended below that the Territorial Acts do not satisfy *Midcal*'s active state supervision test, and Petitioners again have raised that contention in this Court in seeking certiorari review.

However, Petitioners fail to grasp the legal operation of the Territorial Acts upon retail electric service. In the Acts, each electric customer is legislatively assigned to the electric supplier whose distribution lines on April 26, 1984 were in closer proximity to the customer's premises, as a general rule. Ala. Code § 37-14-3(1) (1992) (76a-77a). The Alabama Legislature, however, exempted large load industrial customers (whose initial service requirements equal or exceed 2500 kilowatts) from the Acts; moreover, it declared that the procedures set forth in several previously-executed agreements between retail electric suppliers would govern in areas where the incorporated agreements are applicable. Ala. Code §§ 37-14-3(2), 37-14-8, 37-14-36, 37-14-40 (1992) (79a-80a; 86a-88a; 113a-115a; 124a-125a). Thus, the Alabama Legislature has enacted concrete substantive legislation suppressing competition under which retail electric service territories are allocated to specific providers under general and special territorial rules. Therefore, in both the case of a customer outside an incorporated agreement area and of a customer inside an incorporated agreement area, the state legislature has affirmatively chosen who will provide retail electric service.

This factor is crucial, for it takes this case outside the *Midcal* rule petitioners have advocated. That *Midcal* does not apply in such circumstances has been settled at least since *Hoover v. Ronwin*, 466 U.S. 568 (1984), in which this Court upheld an antitrust challenge to

a state supreme court bar admission committee's alleged conspiracy to reduce the number of practicing attorneys in that state. The *Hoover* Court analogized a state supreme court acting in a legislative capacity to a state legislature, reasoning as follows:

> [U]nder the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the state . . . and *ipso facto* are exempt from the operation of antitrust laws . . . [A] state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature.

Hoover, 466 U.S. at 567-68. The *Hoover* Court rejected *Midcal*'s applicability in circumstances where the legislature acts directly:

> Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to the state authorization. [citing *Midcal*] . . . When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. *Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."*

Hoover, 466 U.S. at 568-569 (emphasis added; footnote omitted).

In this case, Petitioners claim that the private agreements "were merely ratified or rubber-stamped by the Alabama Legislature." (Pet. Cert. 20). However, it is precisely because the Legislature has acted that the state action doctrine applies to the Territorial Acts:

> The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only requirement is that the action be that of the State acting as sovereign.

Hoover, 466 U.S. at 574 (internal quotation marks omitted). Here, the Alabama Legislature has chosen to act, and its reasons and relative wisdom have no place in any inquiry concerning the applicability of antitrust laws to its choice in the field of retail electric service.

Petitioners have advocated granting their petition and/or summary reversal on the basis of not only *Midcal*, but the subsequent decision

in *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992), which was handed down after the district court's second dismissal but well before the Eleventh Circuit's second decision in 1994. *Ticor* involved a negative option rate scheme whereby state agencies (not the legislature itself) possessed a "veto" power over the rates of various title insurers in several states; the Court found the conduct involved essentially to be that of private actors and not the state itself. However, just as *Midcal*'s two-pronged test was held inapplicable in *Hoover* when a state legislature acts, so too would *Ticor*'s reasoning be completely inapplicable to conduct of the sovereign that displaced effective discretion of private actors. By enacting the Territorial Acts, the Alabama Legislature has occupied the field so as to elimate the ability of private suppliers to make effective decisions as to service territories without legislative approval.[7] Moreover, because the legislature has acted, this Court should reject Petitioners' request that this Court go behind the legislative procedures used and examine the process by which the legislature reached its decisions; this Court has rightly and consistently declined to proceed down that slippery slope. *See, e.g., City of Columbia v. Onmi Outdoor Advertising, Inc.*, 499 U.S. 365, 374-79 (1991).

The Petitioners further contend that the citation in the *district court's opinion* (unreported) of the Third Circuit's reversed opinion in *Ticor* warrants review by this Court. Pet. Cert. 21. This betrays a lack of regard for the role of the Court of Appeals in this case, which has already heard and considered the Petitioners' arguments in light of both this Court's inapposite opinion in *Ticor* and the analogous authority of *Hoover*; before the Court is the Eleventh Circuit's 1994

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[7] Petitioners claim that the construction of the Acts adopted by the Eleventh Circuit (requiring legislative approval for any alterations of territories) would defy "common sense" by causing parties to go without electricity for months between legislative sessions. Pet. Cert. 14 n. 10. Of course, what the Cities neglect to mention is that the Territorial Acts encompass the entire state, leaving no area without a supplier of electricity; thus, while a particular customer may not legally be supplied by a supplier other than his or her assigned supplier without legislative action, he or she is nonetheless eligible to receive electric service from that supplier while the legislature considers any applicable territorial reallocation. Thus, the only customers that actually "go for months without electricity" are those so obstinate that they will not accept service from their legislatively-mandated supplier until it is changed to suit their private wishes, regardless of such public considerations of wasteful duplication, aesthetic ruin, etc.

judgment, not the district court's pre-*Ticor* opinion. Certainly, *Ticor* does not warrant summary reversal or remand of the Eleventh Circuit's judgment, as (1) *Ticor* is merely a straightforward reiteration and application of the *Midcal* test, which *Hoover* held inapplicable on these facts; and (2) *Ticor* predates the Eleventh Circuit's decision by more than two years, and was fully briefed and argued by the parties below.

The result reached by the Eleventh Circuit is consistent with this Court's state action jurisprudence, and with scholarly commentary as well. For example, because of the relatively long procedural history of this case (involving two separate reported opinions), the noted antitrust commentators Phillip E. Areeda and Herbert Hovencamp have had an opportunity to consider the specific issue raised by Petitioners in the context of this case. Their analysis is illuminating:

> Suppose that a group of utilities divide certain service areas and propose to the Legislature that their divisions, marked on a map, be ratified by a statute that effectively gives each utility a monopoly in its marked-out area. In that case, the boundaries themselves would appear to be part of the state's policy and with respect to their basic location, there is nothing left to be administered by the private parties. *Parker* should apply, notwithstanding the fact that the original line-drawing was undertaken by private parties acting in concert.

Phillip E. Areeda & Herbert Hovencamp, *Antitrust Law* ¶ 212.7c (1993 Supp.).[8]

Petitioners, unable to create a conflict worthy of certiorari review by pointing to any of Respondents' pre-enactment activity, cite the existence of discrete provisions in three incorporated agreements whose terms Petitioners claim confer discretion upon the parties to those agreements to alter certain service boundaries. By doing so, Petitioners seek to have this Court review the district court's and the Eleventh Circuit's construction of the Territorial Acts, which was

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[8] See also *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6 (1987) (Court envisions that legislation requiring nondiscretionary twelve percent markup of actual wholesale cost of liquor would satisfy "active supervision" principles and would be exempt under *Parker*).

that the Acts preempt any modifications without legislative approval. It will be sufficient to note in this regard that both Territorial Acts contain language providing that "no *subsequent agreement* shall be valid unless and until it has been reviewed" by the legislature and approved by that body via amendment of the Territorial Acts. Ala. Code § 37-14-8, 37-14-36 (1992) (emphasis added). The district court in this case, bound by Alabama state law compelling construction in favor of the validity of the statute (*see Thomas v. Reliance Ins. Co.*, 617 F.2d 122, 125 (5th Cir. 1980)[9]; *House v. Cullman County*, 593 So. 2d 69, 71-71 (Ala. 1992)), held that the term "subsequent agreement" in the Territorial Acts included agreed modifications to the incorporated accords, as well as brand new agreements concerning service divisions. The Eleventh Circuit, bound to perform plenary review of such legal questions (*Salve Regina College v. Russell*, 499 U.S. 225 (1991)), did so and found no error. There is nothing to be found in the opinions below or on this record that would counsel abandonment of this Court's salutary practice of deferring to the construction of state statutes such as the Territorial Acts by lower courts (*e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985)), who are better schooled in and more able to interpret the laws of their respective states (*id.*).

Even had some discretion effectively to alter the incorporated agreements actually remained in the original parties, there would nevertheless be no applicable requirement of active supervision of the conduct of the parties. It will be noted that all three agreements cited by the Petitioners as purportedly allowing for bilateral revisions (i.e., the Tarrant City/Alabama Power Company agreement, the Cullman Utilities Board/Cullman Electric Cooperative agreement, and the Southern Pine Electric Cooperative/City of Evergreen agreement (126a-137a, 150a-51a)) involve a municipality as a party. This Court has squarely held that the second prong of the *Midcal* test, that of active supervision of anticompetitive conduct, does not apply to municipal actors. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). Even under the Petitioners' theory, for a bilateral revision to take place with respect to these incorporated agreements, a peti-

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[9] The district court was bound by this former Fifth Circuit precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

tioner municipality must acquiesce to the change, and because its anticompetitive conduct need not meet *Midcal*'s second prong, the manifestation of that conduct (i.e., a modification of service boundaries) need not meet "active supervision" scrutiny.

From a review of the pertinent authorities of this Court, one is left with the inescapable conclusion that the activities challenged by the Petitioners fall inside the parameters of the *Parker* state action doctrine, as construed in *Hoover*. Petitioners have failed to show any conflict between this Court's *Midcal/Ticor* active supervision test applicable to non-sovereigns and the result reached by the Eleventh Circuit — there exists no authority on the part of retail electric sellers to agree to alter the legislatively-created boundaries of Alabama electric service areas, and no discretion is left to private entities triggering *Midcal*'s supervision requirement. Thus, Petitioners' requests that a writ of certiorari issue and that the judgment of the Eleventh Circuit be vacated are due to be denied.

II. *Parker v. Brown* is Not Due to be Revisited

From the forgoing, it will be noted that the Eleventh Circuit's judgment, rather than conflicting with the Court's state action precedents, is wholly consonant with them. However, Petitioners do not content themselves merely with relying upon a perceived conflict between this Court's opinions and the Eleventh Circuit's decision, but also contend that this Court should re-examine the *Parker* state action doctrine *in toto*. This invitation should be rejected, not only because the state action doctrine has become a fixture of antitrust jurisprudence that has the implicit approval of Congress, but because *Parker*'s central holding is fundamentally sound; moreover, this case is ill-equipped to serve as a vehicle for such a re-examination.

Parker v. Brown was decided in 1943, at the beginning of the 78th Congress. The United States has recently elected and installed the 104th Congress, and during the fifty-two-year interim, no legislation has been adopted to alter or abrogate the *Parker* holding with respect to state action antitrust exemptions. Twenty-six Congresses have been aware of the state action doctrine and have left the Sherman and Clayton Acts intact in this respect.

Moreover, this Court ten years ago considered whether *Parker* should be overruled in the face of a dissenting opinion that would

have held that exceptions from the Sherman Act must come from Congress, and not the Court. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 68 (1985) (Stephens, J., dissenting). Six members of this Court joined Justice Powell's opinion for the Court, which contained this rejoinder:

> [T]he logical result of [the dissent's] reasoning would require us to overrule *Parker v. Brown* and its progeny, for the state action doctrine is an implied exemption to the antitrust laws. After over 40 years of congressional acquiescence, we are unwilling to abandon the *Parker* doctrine.

471 U.S. at 55 n. 18. If over 40 years of congressional acquiescence counseled against judicial abandonment of the *Parker* doctrine in 1984, there can be no question that over 10 additional years of such silence give rise to an even greater justification not to tamper with fundamental antitrust jurisprudence, as Petitioners would advocate.[10]

Additionally, *Parker*'s reasoning remains fundamentally sound, in that fifty-two years have not altered the absence of any contemporary indication in 1890 that the Sherman Act was intended to restrain state action. 317 U.S. at 351. The absence of clear language in the Sherman Act making it applicable to actions of state legislatures, such as Alabama's in this case, shows an implicit congressional intent to respect the rights of state governments in a federal system: "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351. Congress is constitutionally empowered to preempt state power in certain circumstances, and has certainly proved capable of drafting statutes to accomplish that end (e.g., 29 U.S.C. § 1144(a) (1988) (ERISA preemption clause)), which only increases the cogency of *Parker*'s analysis of the silence of antitrust law in this regard.

Finally, this case does not present a proper one for reconsideration of *Parker*. Petitioners here are fighting a rear-guard action against

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[10] In the 52 years since *Parker*'s decision, Section 1 of the Sherman Act (15 U.S.C. § 1 (1988)) has been re-enacted four times without substantial change (in 1955, 1974, 1975, and 1990), which indicates congressional ratification of the Court's interpretation of the Act's substantive exemptions. *See Douglas v. Sea Coast Prods., Inc.*, 431 U.S. 265, 278-79 (1977).

a state-mandated effort to reduce wasteful duplication of electric generating and transmitting resources in Alabama by claiming that all other electric suppliers "captured" the Alabama Legislature and caused it to pass legislation vesting broad discretion along certain incorporated-agreement service boundaries in the various suppliers' territories. What Alabama has done is no different from the actions of at least 34 additional states that allocate electric supply privileges among various retail suppliers.[11] The injection of uncertainty in the applicability of the state action doctrine would disrupt the territorial divisions of (and service of electricity to) customers in those states, in the name of furthering competition at the expense of an express state policy to limit it. Certainly, the legislatures of forty-eight states should not be compelled against their will to follow two states' proposed novel procompetition experiments in the area of retail electricity if they deem competition wasteful, duplicative, and aesthetically destructive as Alabama does.[12]

Finally, Petitioners resort to a claim that certiorari should be granted because of a claimed refusal or failure to exchange territorial maps. Assuming for the moment the truth of this contention, which these Respondents would dispute,[13] this fact does not warrant the grant of certiorari review in this Court. Petitioners are well aware of their rights under state law to compel compliance with such provisions of the Territorial Acts[14], and may resort to these adequate remedies if their claims are meritorious. However, to grant certiorari on the grounds of a claimed failure to comply with a state law map exchange requirement would be a great waste of this Court's finite resources, and these Respondents urge rejection of this last, desperate ground asserted by the Petitioners.

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[11] See note 4, above.

[12] A reference to the California and Michigan proposals cited by the Petitioners (Pet. Cert. 27-28).

[13] Absolutely no factual substantiation for this claim appeared in the record before the Court of Appeals.

[14] Ala. Code § 37-14-9 (1992).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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